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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 207.

SAMUEL M. DAMON,

PLAINTIFF IN ERROR,

vs.

TERRITORY OF HAWAII,

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR.

LORRIN ANDREWS,

Attorney-General, Territory of Hawaii, for Defendant in Error.

EAGLE PRESS, BROOKLYN-NEW YORK

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STATEMENT OF THE CASE.

This is an action brought on a writ of error from the Supreme Court of the Territory of Hawaii. The errors asigned being as follows:

That the Supreme Court of Hawaii erred in deciding:

First. That no title to the fisheries claimed passed to the plaintiff's grantors by virtue of the Royal Patent No. 7858.

Second. That no vested right in the sea fisheries as against the Territory of Hawaii could have been acquired by virtue of the laws of the Kingdom of Hawaii respecting fisheries, and that upon the

repeal of said laws respecting fisheries by the Organic Act that the plaintiff's right in said sea fisheries terminated.

The decision upon which these errors are assigned was in a case brought by virtue of Section 96 of "An Act to Provide a Government for the Territory of Hawaii," passed by the Fifty-sixth Congress of the United States, which reads as follows:

"Sec. 96. That any person who claims a private right to any such fishery shall, within two years after the taking effect of this act, file his petition in a Circuit Court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the Attorney-General, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

"That if such fishing right be established, the Attorney-General of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated."

Under said section, the plaintiff in said case claimed that he had a "vested right," both by reason of an alleged grant and by reason of prescription and custom.

All the Hawaiian laws, from the original proclamation of Kamehameha III, in relation to fisheries, in chronological order, as well as a glossary of Hawaiian terms used in connection with the case,

and the decision of the Supreme Court of the Territory of Hawaii in this case, are made an appendix to this brief, and the Court is respectfully referred to the same.

I

An examination of the language of the patent (see transcript of record, pages 3-6) shows that only *land* was granted therein. The operative words of conveyance apply only to the land. The recital that a fishery in the sea is "attached" to the land does not grant the fishery.

"An entire absence of operative words has been held a fatal defect as failing to show an intention to convey, although the deed was otherwise formally complete."

9 Am. & Eng. Enc., 138.

"To enable a deed to operate as an effectual conveyance there should be proper and sufficient words manifesting an intention to transfer an estate."

1 Devlin on Deeds, Section 211.
See McKinney vs. Settles, 31 Mo., 541.
Hennelman vs. Mounts, 87 Ind., 178.

The fact that the konohiki or landlord of Moanalua has always followed the statutory provisions of the Hawaiian Islands in the use and management of the fisheries indicates clearly that he was claiming under the statute and not under his award or patent.

See testimony of Heu (transcript of record, pages 6-10).

There is certainly a doubt as to whether the intention was to grant the fishery, and, this being the case, the doubt must be construed against the grantee.

Government grants of lands, franchises and privileges are invariably construed in favor of the public and against the grantee.

> Charles Bridge vs. Warren Bridge, 11 Peters, 539.
>
> Fertilizing Company vs. Hyde Park, 97 U. S., 666.
>
> Martin vs. Waddell, 16 Peters, 411.
>
> Tucker vs. Ferguson, 22 Wall, 575.
>
> Newton vs. Commissioners, 100 U. S., 561.
>
> Shively vs. Bowlby, 152 U. S., 1.
>
> Johnson vs. Crowe, 87 Pa. State, 184.
>
> Commissioners vs. Water Co., 104 Mass., 449.
>
> Water Co. vs. Water Co., 80 Maine, 563.

The application of this well-established rule to this case must convince the Court that there is absolutely nothing in the said Royal Patent which grants to the grantee any ownership in the said fishing rights.

There appears in the patent after the operative words of grant and the description of the land conveyed, merely a recital "that there is also attached to this land a fishing right in the adjoining sea, which is bounded as follows," following which is a description by metes and bounds of the alleged fishery.

The habendum clause of the patent reads in part "to have and to hold the above entitled land in fee simple," etc. This clearly shows that the patent was merely a grant of land. The operative words of grant are not enlarged by the habendum clause. The fishing right was not *land* or a necessary part thereof.

There is no declaration in the patent that the

grantee shall have and hold anything further than the land recited above. The word "attached" cannot certainly be twisted by the Court into a construction of an "award" or "grant."

The authorities quoted above, and the general rules of law are all against such an assumption. Even if the intention of a party to convey certain property is clear to himself, unless he, as a matter of law, does convey such property by clear and unequivocal words, so that there can be no mistake as to his meaning in years to come, the successors of his grantees cannot claim such property, and the only evidence from which the absolute intention of the grantor can be ascertained is from the deed in question.

It does not appear from the patent that it was the intention of the grantor to convey the fishery. The recital relative to the fishery may have been inserted for the purpose of making plain the boundaries of the fishery adjoining the land in which the statutes then in force gave the landlord special privileges.

The plaintiff, it seems, took this view of the matter, as the evidence shows that he exercised the right in the fishery under the statute, and under that alone.

Under the common law the right of fishing in the open sea, like that of navigation, was a public right. It is submitted that all presumptions of law are in favor of the doctrine that it is still a common right, free to all people of the country, and that this Court will not indulge in the presumption that a grant was intended to be made of a monopoly of such rights, which is contrary to all the tenets of both American and English jurisprudence.

Every presumption should be against the grant and in favor of the public. Every ambiguity or

doubt in the instrument by which the right is claimed to be granted should be construed most strongly against the grantee.

II.

The argument of the plaintiff in error throughout this case has been that he claimed a vested right in the aforesaid fisheries outside of the claim that it was expressly granted to him by the Royal Patent, under three additional grounds.

1. As an appurtenance to his land.
2. By prescription, and
3. By custom.

The fishery laws as they existed at the time of the passage of "An Act to Provide a Government for the Territory of Hawaii," under which act this suit is brought, are found in sections 1449-1466, Penal Laws of 1897 of Hawaii.

Section 1452 provides that the fishing grounds out to the reefs, or one mile from the beach, shall be considered the private property of the konohiki or landlord, subject to certain restrictions.

Section 1453 provides that the konohikis or landlords shall hold the fishery for the equal use of themselves and their tenants, subject to the restrictions imposed by law.

Sections 1454 and 1455 provide that the konohikis or landlords may take certain fish for their exclusive use. Penalties are provided for the violation of the konohikis' and tenants' rights.

Sections 95 and 96 of the Organic Act, above referred to, provide as follows:

"Sec. 95. That all the laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Ha-

waii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this Act, unless established as hereinafter provided.

"Sec. 96. That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the Attorney-General, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

"That if such fishing right be established, the Attorney-General of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated."

It must be clear that the question whether the plaintiff has a vested right depends upon whether the statute amounts to an executed contract or grant, for if the statute merely conferred a privilege or license, that privilege or license would terminate with the repeal of the statute, and there could be no vested right.

In 1839 Kamehameha III, the sole owner of all the fisheries within his kingdom, made the following formal declaration: "His Majesty, the King, hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai and gives one

portion of them to the common people, another portion to the landlords, and a portion he reserves to himself." To the people were given the fishing grounds beyond the reefs, "but the fishing grounds from the coral reefs to the sea beach are for the landlords and for the tenants of their several lands, but not for others."

These rights were still more clearly defined in the statute of 1845, which provided, among other things, that where there are no reefs the landlords' fisheries should extend to the beach "from the distance of one geographical mile seaward."

It cannot be seen how the statutory enactments relating to fisheries can be construed as a grant or as creating a contractural relation. No specific description or bounds are given; no grantee is named; the nature of the estate claimed to have been granted is not specified; there is nothing to indicate any boundary between the adjoining fisheries. The lands granted to the various landlords had different shapes. Some spread out in the form of triangles, the apex being at the mountains and the base towards the sea, others in irregular shapes had their largest extent towards the mountains. In such cases in what direction would the seaward lines demarking the fisheries run? Would they run at right angles to the beach in parallel lines, or where the apex of the land granted and held was at the mountains would the rights in the ocean continue on the lines of the triangle, spreading and covering a larger portion of the sea than of the land.

No such general language as this proclamation or as the subsequent statutes contained; no such uncertainty as to the grantees, the subject matter of the grant, and the nature of the estate can be considered as intended for a grant in praesenti, an

executed contract conferring vested rights. To so decide would throw all grants of property into endless confusion.

In 1848, Kamehameha III, by another proclamation, made a similar award of *lands*, but the Hawaiian decisions have repeatedly held that said declaration by the King was not sufficient to grant the lands, and that explicit Royal Patents were necessary in order to give title to any one in the lands granted formally by proclamation.

(See Hawaiian decisions quoted later in brief.)

It is taken for granted that the Court will agree with the statement that the right to fish in tide waters is a public right, and that under the English and American decisions, and the common law of England, property in the sea belongs to no man, and that to give a person or persons monopolistic rights to control waters of the ocean, whether for fishing or other purpose, is against the teachings of American and English jurisprudence.

"The right to fish in the tide waters is a public right." See 13, Am. & Eng Enc., 560 et seq.

"By the common law both the title and dominion of the sea and of rivers and arms of the sea, where the tide ebbs and flows, and of all the land below high water mark, within the jurisdiction of the Crown of England are in the King. Such waters and the land which they cover, either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primal uses are public in their nature for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. . .

The common law of England upon this subject at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and States or by the Constitution and Laws of the United States."

Shively vs. Bowlby, 152 U. S., 1.

"Whatever soil below low water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the Declaration of Independence, and this soil is held by the State not only subject to but in some sense in trust for the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish."

Smith vs. Maryland, 18 Howard, 71.

"The law which governs this case is well settled by repeated and carefully considered decisions of this Court. The right of fishing in the sea or rivers in any town in this commonwealth, either for swimming fish or for shellfish, is a public right which belongs to all the inhabitants of the town, unless restricted by acts of the legislature, or of the town, inconsistent therewith, or by prescription, and a grant by the legislature to a town of the title in the bed of a river, or in flats covered by tide water, within its limits does not convey by implication the right of fishing to the town as its own property, for the right of fishing not being an incident to the right of property in the soil, but a public right to take the fish, which, whether moving in the water

or imbedded in the mud covered by it, depend on the water for their nourishment and existence is unaffected by the question whether the title in the land under water is in the commonwealth, in the town or in private persons."

Proctor vs. Wells, 103 Mass., 216.

"The right to navigate the public waters of the State and to fish therein, and the right to use the public highways are all public rights belonging to the people at large. They are not private, inalienable rights of each individual."

Lansing vs. Smith, 4 Wend., 9.

"By the common law the King has parens patria owned the soil under all the waters of all navigable rivers or arms of the sea where the tide regularly ebbs and flows including the shore or bank to high water mark. He held these rights, not for his own benefit, but for the benefit of his subjects at large; who were entitled to the free use of the sea and all tide waters, for the purpose of navigation, fishing, etc., subject to such regulations and restrictions as the Crown or the Parliament might prescribe. By Magna Charta, and many subsequent statutes, the powers of the King are limited, and he cannot now deprive his subjects of these rights by granting the public navigable waters to individuals. . . .

"The right to navigate the public waters of the State and to fish therein and the right to use the public highways are all public rights belonging to the people at large. They are not the private inalienable rights of each individual. Hence the legislature, as the representative of the public, may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to

the public at large, provided they do not interfere with vested rights, which have been granted to individuals.

Lansing vs. Smith, 4 Wend., 20.

"The true question is whether, by authorizing the Commissioners of the Land Office to make the grant to the plaintiff, they have precluded themselves from making a great public improvement for the benefit of commerce. I can see nothing in the Constitution of this State or of the United States which can give such an effect to the grant. On the contrary, the act itself, under which the patent issued, authorized the grant to be made only where it was deemed beneficial to commerce; and it would be directly in opposition to the spirit of the law to give a construction to this grant which would deprive the State of the power to regulate the wharves, ports, harbors and navigable waters within its boundaries for the benefit of commerce.

Lansing vs. Smith, 4 Wend., 23.

"Navigable rivers where the tide ebbs and flows, including both the waters and the land under the waters, for the purpose of navigation, fishing and all other uses of the water and its products are common to all the people of New Jersey.

Wooley vs. Campbell, 37 N. J. Law, 163.

"At common law the right of fishing in navigable waters was public and common to all, and in waters not navigable it was limited to the riparian owner of the soil and belonged exclusively to him."

State vs. Roberts, 59 New Hampshire, 256.

"This Court are therefore of opinion that where flats are left wholly open to the natural ebb and

flow of the tide unoccupied and unenclosed by the upland proprietor, the right of fishing on the part of the public is not excluded, and that the law in this respect makes no difference between shellfish and swimming or floating fish.

Weston vs. Sampson, 8 Cush., 347.

"If the defendant has any title to the land under the waters of that portion of Lake Huron known as Thunder Bay, he must have derived it either by a grant from the United States or from the State of Michigan. He claims it by grant from the United States and by virtue of his riparian proprietorship in Sulphur Island, and that as a concomitant of this interest in the soil he has the exclusive right of fishery in the waters of the bay in front of the island, at least so far as the driving of stakes in the soil and the use of trap-nets is concerned. What then are the boundaries made by the United States Government of the land on Sulphur Island? I have no hesitation in saying that they are limited by low water mark. . . . There is nothing in the previous decisions of this State which determines the defendant's exclusive right of fishing at the points stated in the declaration. I think that the waters of Thunder Bay are public waters, and the right of fishing therein is a common right of all the citizens of this State, subject to the paramount right of navigation, and is the subject of legislative control."

Lincoln vs. Davis, 53 Mich., 375.

The clear result of the foregoing citations is that at common law the right to fish in tide waters is a public right; that the riparian proprietors have no greater right to fish in the waters adjoining their land than that possessed by every citizen, and that

there can be no exclusive right in such waters as an appurtenance to the lands bordering thereon. This doctrine is so well settled that there is nothing strange or startling in the fact that it was adopted and carried out in the old Hawaiian decisions, which have never been reversed.

In the case of Haalelea vs. Montgomery, 2 Haw., 70, the leading decision on ancient fishing rights when special privileges were held by the landlords under the Hawaiian statutes, the Court held that the landlord's fishing rights were not an appurtenance to his ownership of the land, and could not be transferred by said landlord with his land as an appurtenance.

"None of the rights of piscary possessed by M. Kekauonohi as owner of the fishery could have passed as a mere appurtenance to the piece of land conveyed to Isaac Montgomery. She could have transferred the fishery or her right therein only by an express grant eo nomine. Had she made a deed even of the whole Ahupuaa by metes and bounds not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee."

Haalelea vs. Montgomery, 2 Haw., 70.

The result of this case has stood as the undisputed law of the Hawaiian Islands for nearly half a century, and it is submitted cannot now be shaken by the rant of counsel claiming special privileges for a monopoly.

In answer to the argument that said fishery rights could be claimed as an appurtenance to any land granted, the decision of the Hawaiian Supreme Court in the case at bar, 14 Hawaiian, pages 474 to 479, is further submitted.

III.

The next claim made by plaintiff in this case is that he has a prescriptive right in said fishery by reason of long occupation.

It is conceded that dicta to the effect that exclusive rights of fishery may be acquired "by grant or prescription" may be found in several decisions of the various States of the Union; but it is submitted that few, if any, cases have actually decided on an existing state of facts that such a right may be acquired by prescription against the State, and that the great bulk of judicial decisions, as well as judicial feeling has been against the granting or the maintaining of monopolies in the waters of the ocean as against the free right of the inhabitants of the land to use said waters without restriction.

See 13 Am. & Eng. Enc., 581, note 3.

"Independently of the Acts of Assembly there is no exclusive right of fishing by the riparian proprietor opposite to his shore in any navigable river. . . . In England there are such several and exclusive fisheries in navigable rivers attached to manors, either by early grant from the Crown or by prescription because there might have been such a grant on which to found it. In this State there can be no such prescription. Prescription rests upon a presumption of a grant which has been lost by process of time. No prescription can, therefore, have a legal origin where no grant could have been made to support it."

Fishing Co. vs. Carter, 61 Pa. State, 21.

To hold that prescriptive rights to fish may be acquired in tide waters is to ignore the principle that exclusive fishing rights can be acquired only

from the legislature, and to upset the rule that time does not run against the State.

There are additional reasons in this case why the title to the fishery cannot be acquired by prescription. It is conceded that the exercise of rights in the fishery claimed here have been exercised under and pursuant to our statutory regulations, and it is submitted that it is simply impossible for one to acquire title to any public property by user when the use exercised was authorized and permitted by an act of the legislature. Such use or possession being permissive cannot result in the acquisition of title.

"A mere permissive possession, or one consistent with title of another, however long continued, can never ripen into a title by adverse possession.

1 Am. & Eng. Enc., 794.

"It would shock that sense of right which must be felt equally by legislators and by Judges if a possession which was permissive and entirely consistent with the title of another should silently bar that title."

Kirk vs. Smith, 9 Wheat., 288.

The Statutory authorization which allowed the Konohikis or landlords and their tenants to use the fisheries within the reef "or one mile seaward," while the "common people" were given the enjoyment of the outer fisheries, was a legitimate exercise of power by the Legislature, and perfectly consistent with the public ownership of all the fisheries, but now that the Statute has been repealed it would be just as consistent for the "common people" to attempt to exclude the landlords or those who have acquired Konohiki lands and their tenants from the deep sea fisheries as it is for the

latter to exclude the former from the shallow fisheries.

The Land Commission created by act of law was given express authority to award fishing rights by the Statute which created it.

"The decisions of said Board shall be in accordance with the principles established by the Civil Code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, etc. . . . Which decisions, being of a majority of said Board, shall be only subject to appeal to the Supreme Court as prescribed in the act to organize the Judiciary, and when such appeal shall not have been taken they shall be final."

Section 7, Art. 4, Laws of 1846, creating Land Commission.

And in some cases they made such awards.

Akeni vs. Wong Kau Mau, 5 Haw., 91.

Their authority to award fishing rights as well as land has never been questioned. It has been the law of Hawaii since the time of the land commission that any person who had a claim cognizable by that Board and failed to present the same and obtain an award thereon, lost his claim.

"The Land Commission was a Court and had full jurisdiction to settle all claims to land, whether by claimants of the larger divisions of land as divided in ancient time by name or by the natives living on the land under the chiefs. If the Land Commission expired and the native tenants neglected to present their claims for the parcels of the land which they desired, and for which they would ordinarily be awarded a Kuleana title, showing merely their occupation of the same as a foundation

for it, we think they must be considered as content with their prior status as tenants by permission of the land owner. Such tenancy would, therefore, in law be considered as continuing until some act of theirs changed their holding from the permissive nature to one of adverse or hostile nature."

Dowsett vs. Maukeala, 10 Haw., 169.

"No claim to the land called Opu had been presented to the Commission to quiet land titles within the time limited by Statute for filing such claims and the land had not been awarded by the Commission to any one, nor had a Royal Patent been issued to any one for it. Held that by the force and effect of the Statute creating the Land Commission the claim which defendant's predecessor had to this land was barred in law by non-presentation to the Commission and they have no title to it. The land not being held by defendant by some title preceding from the government, it is still the property of the government."

Thurston vs. Bishop, 7 Haw., 421.

"The construction put upon the Statute that a failure to present a claim within the prescribed time absolutely barred the claimant by the legislative power of the Kingdom, the King and the nobles and the representatives and uniformly concurred in and acted upon by successive governments under many reigns following, and to this day undisturbed by any judicial decisions, we are not at liberty to disregard."

Thurston vs. Bishop, 432.

"The Mahele itself does not give a title. It is a division and of great value, because if confirmed by the Board of Land Commissioners a complete title

is obtained, but it was open to examination and if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed the Board of Land Commissioners, their award gave a complete title. By the Mahele, his Majesty, the King, consented that Pahoa should have the land subject to the award of the Land Commission. It appears by the whole course of legislation that an award of the Board of Land Commissioners was necessary to perfect the title until by the Laws of 1860 the Minister of the Interior was authorized to grant awards."

Kenoa vs. Meek, 6 Haw., 67.
See also, Kaai vs. Mahuka, 5 Haw., 356.
Kahoomana vs. Minister, 3 Haw., 639.

It is submitted that there can be no merit in the alleged claim by prescription.

IV.

It is respectfully submitted that the same argument applied to prescription applies as to the claim set up through custom. No custom can transfer the title of public property to an individual.

No custom could override the provisions of the law which gave to the Board of Land Commissioners authority and jurisdiction to pass upon and award fishing rights and made it incumbent upon claimants to present their claims to the Board for adjudication.

"Even at common law a right to fish could not be acquired by custom."

See 13 Am. & Eng. Enc., 583.

No custom antedating the Act of 1839 could have any force or value. At that time the title to all

the fisheries was in the King. The only law and the only lawful custom was the will of the King. The King's title passed to the government and became subject to the Legislative will as expressed in public enactments. The futility of inquiring into the ancient custom since the passage of the Statute was recognized by the Court in Hawaii.

It was argued by the plaintiff in this case that the Statute of 1839 was merely declaratory, declaring rights which had previously existed from time immemorial. We cannot agree with this contention, and submit that argument shows its fallacy.

It is undisputable that in 1839 the title to all the fisheries, as well as the land, was vested in the King. It is true that the Land Commission recognized certain rights in the chiefs and the people, but those rights were moral rather than legal, and they only became legal rights upon the issuance of an award.

And as has been seen any claims that were not awarded lapsed and the title remained in the government or the awardee of a larger land within which the claim might have been asserted as the case might be.

It is probable that the King had previously allotted fisheries to his chiefs as it was his custom to do in regard to the lands, but such allotments merely created tenancies at the will of the King.

The Declaration of the King in 1839 that he resumed possession of the fisheries for the purpose of redistributing them goes to prove his absolute ownership and control of them, and indicates also that the act was not merely declaratory of pre-existing custom, but that it changed the allotment which had been in vogue theretofore.

"His Majesty, the King, hereby takes the fishing

grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords and a portion he reserves to himself," and further:

"These are the fishing grounds which his Majesty the King takes and gives to the people."

This language is not such language as would be declaratory of pre-existing rights and custom. It is the language of an absolute power. He "takes" from one party who has held it heretofore and "gives" to another party according to his will. It is a distinct change in the allotment which had been in vogue theretofore.

V.

It is submitted that it has been shown that the plaintiff's claim cannot be sustained upon the theory that the fishing right is an appurtance to this land, or that he has or can show title by prescription, or that such a right can be sustained by proof of custom.

There are further considerations which it is submitted not only negative the theories of plaintiff, but show affirmatively that his right is not a vested one within the meaning of the Organic Act of the Territory of Hawaii.

It is admitted that the "Konohikis'" or landlords' right of fishery was a property right as long as the Statute remained in force, but it is denied that it was a vested right in the sense that it could not be changed or defeated by act of the legislative authority, either by way of an amendment, making a new distribution of the fisheries, or by a repeal putting an end to all exclusive rights, and in this sense we use the word "property" and believe it is

used in the various Statutes in the general sense, meaning dominion over a thing, and that the words "private property" in these Statutes cannot mean more than the rights which the Statute gave to the Konohikis or landlords over the fishery, and such private property could not be said to be held by contract or by any covenant in the nature of a contract.

A mere expectation based upon an anticipated continuance of general laws cannot be claimed to be a vested right. In order to be a vested right there must be an actual title to some property.

Not only is the right of fisheries in tide waters a public right, but "laws for the regulation of fishing are public Statutes of which the Court takes judicial notice."

Gould on Waters, Sec. 189.

That the Statute in question prescribes the "piscatory regulations" of Hawaii.

See Haalelea vs. Montgomery, 2 Haw., 65.

It is well settled that there can be no vested right under a public statute relating to a public subject that does not amount to a grant or contract.

"The Dartmouth College case was the pioneer in this field of our jurisprudence. The principle there laid down, since maintained in the cases which have followed and been controlled by it, has no application where the Statute in question is a public law relating to a public subject within the domain of the general legislative power of the State, and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation."

Newton vs. Commissioners, 100 U. S., 587.

"It is generally agreed, however, that there can be no such thing as a vested right in a public law, which is not in the nature of a grant, hence, however beneficial an act of the legislature may happen to be to a particular person, or however injurious its repeal may affect him, the legislature would clearly have the right to abrogate it. Indeed, the legislature has the undoubted right to repeal all legislative acts which are not in the nature of contracts or private grants."

Dobbins vs. Bank, 112 Ill., 562.

In Maryland a Statute authorized any citizen of any county bordering on the waters of the State to locate and appropriate within the waters thereof any area not exceeding one acre, for the purpose of depositing and bedding oysters. Under this act it was held that "It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred that no transfer of the State's title to lands covered by navigable water was contemplated. Permission to use given areas covered by navigable water for a particular purpose seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the State but as a conditional license, revocable at the pleasure of the legislature."

Phipps vs. State, 85 Am. Dec., 654.

In Pratt vs. Brown, 3 Wis., 603, it was held that the right given by statute to mill owners to build dams and flood their neighbors' lands was not a vested right, but one which terminated with the repeal of the act. We submit that that case is directly in point here. Opposite counsel tried to distinguish it on the ground that the mill dam act

under which the dam was built was void because of its taking private property for private purposes. The point is not well taken. The decision in that case shows that the constitutionality of the act had been previously sustained. The flooding of lands for mill purposes is generally considered a public purpose. See Commissioners vs. Water Power Co., 104 Mass., 446.

"A privilege to a private person to use the public right for his private gain will not be deemed exclusive unless the intent of the legislature is perfectly clear. All these great rights are held in trust for the general good, and the representatives of the people must be deemed not guilty of a breach of this trust, or a dereliction of duty. Hence nothing less than a plain contract between the State and the individual for an adequate consideration can bind the hands of the State and prevent the repeal of a mere privilege."

Johnson vs. Crow, 87 Pa. St., 189.

The cases of railroad grants cited at the argument by counsel for plaintiff in support of his contention that our fishery statute amounted to a grant are easily distinguishable. The language of the two statutes are strikingly different. Mark, for example, the statute quoted in Railroad vs. Price, 133 U. S., 497, "That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, etc., as the State may determine, etc., every alternate section of public land designated by odd numbers, etc."

There is no comparison between the two cases.

Regarding the declaration of the King of 1839 as a "mahele," the mere declaration or division cannot be construed as conferring any title.

The Great Mahele of the lands did not confer title but only paved the way to get title.

Kenoa vs. Meek, 6 Haw., 63.

By parity of reasoning the King's declaration as to the fisheries, less formal and definite than the mahele of the lands as it was, did not give any title, but at best merely paved the way to get title through the Board of Land Commissioners.

The fact that the konohikis owned no lands in 1839 tends to prove that the statutory declaration and enactment was not intended to be a grant in praesenti. And the further fact that but few fisheries were awarded by the Land Commission goes to show that but few persons were able to prove their claims according to the rules and principles which governed the Commission.

We find that a somewhat similar principle is recognized in the United States land system. Thus it has been held that the swamp land act of 1850 "made a grant in praesenti, in other words, the title then passed to all lands which at that date were swamp lands; and the only matters thereafter to be considered were those of identification. But while the act operated as a grant in praesenti, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. . . . It will be perceived that the act contemplated the issue of a patent as a means of transferring the legal title. . . . When he (the Secretary of the Interior) made such identification, then, and not before, the State was entitled to a patent, and on such patent the fee simple title vested in the State. The State's title was at the outset an inchoate one and did not become perfect, as the date of the act, until a patent was issued."

Lumber Co. vs. Rust, 168 U. S., 589.

Under such a statute the failure of the Secretary of the Interior to identify any land or particular tract of land as swamp would be the equivalent of the failure or refusal of the Land Commission to award a fishery. The title would not pass to the claimant. He would acquire no vested right.

Counsel argued that formerly the fisheries were considered more important and more valuable than the land. That being so, it emphasizes our contention that in order to obtain title to a fishery it was necessary to procure an award. While it is conceded that private exclusive rights in the public waters may be obtained by individuals it is earnestly contended that they can only be obtained by clear and unequivocal grant under legislative authority. And while the necessity and duty of the courts to protect vested rights is freely admitted, it is submitted that the burden is on the party claiming such a right to prove that he has it.

It seems very clear that the general konohiki right was only a statutory privilege which was terminated by the Act of Congress which opened the sea fisheries to the public and saved only vested rights. The saving clause will not be rendered valueless by so holding, because some fisheries were actually awarded by the Land Commission, and the owners of such fisheries are protected in their property by that saving clause.

It is respectfully submitted that the judgments of the lower courts should be affirmed.

LORRIN ANDREWS,
Attorney-General of Hawaii,
For Defendant-in-Error.

April, 1904.

APPENDIX.

Glossary of Hawaiian Words and Terms Used in Hawaiian Decisions and in Connecton with this Case.

"Ahupuaa."—A large tract of land granted to a Konohiki, or overlord, and including often within its boundaries a series of smaller grants to tenants of the overlord.

"Konohiki."—Landlord or overlord who, under the feudal system of the Hawaiian Islands was usually a chief or man of importance, who controlled large tracts of land with supervisory powers over his tenants and their lands.

"Kuleana."—A small portion of land within an Ahupuaa, belonging to the tenants of the Konohiki.

"Mahele."—To divide up; a division of property between one or more persons.

Laws Relating to Fisheries and Fishing Rights in the Hawaiian Islands, in chronological order, as well as Organization of Land Commission Board and Mahele Act of King Kamehameha III.

The first written law is Chapter 3 of the Laws of 1839, which is as follows:

"His Majesty the King hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords, and a portion he reserves to himself. These are the fishing grounds which his Majesty the King, takes and gives to the people. The fishing grounds without the coral reef, namely, the Kilohee grounds, the Lohee grounds, the Malolo grounds, together with ocean beyond.

"But the fishing grounds from the coral reef to the sea beach are for the landlords and for the tenants of their several lands, but not for others."

LAWS OF 1845.

ARTICLE V.—OF THE PUBLIC AND PRIVATE RIGHTS OF PISCARY.

SECTION I.—The entire marine space, without and seaward of the reefs, upon the coasts of the several islands, comprising the several fishing grounds commonly known as the *Kilohee grounds*, the *Luhee grounds*, the *Malolo ground*, and the fishery of the ocean, from said reefs to the limit of the marine jurisdiction in the first article of this chapter defined, shall be free to the people of these islands. The people shall not be molested in the enjoyment thereof except as hereinafter provided.

SEC. II.—The fishing grounds from the reefs, and where there happen to be no reefs from the distance of one geographical mile seaward to the beach at low-water mark, shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries the said landholders shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth.

SEC. III.—The landholders shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions in this article imposed.

SEC. IV.—The landlords shall have power each year to set apart for themselves one given species

or variety of fish natural to their respective fisheries, giving public notice by *viva voce* proclamation to their tenants and others residing on their lands, and signifying to the Minister of the Interior, in writing, through his agents in their districts, the kind and description of fish which they have chosen to set apart for themselves. The landlords shall respectively pay for such notification the fees prescribed by the third part of this act; and it shall be the duty of the Minister of the Interior yearly to furnish the Director of the government press with a list of said landlords, the districts and islands of their residence, and the kind of fish specially set apart by each, in the form of catalogue, which catalogue the said Director shall cause to be once inserted in Hawaiian and English languages, in the Polynesian newspaper, for public information, at the expense of said Minister, to be included by him, according to a fixed rate, in the fees to be received at his department from the respective landlords.

SEC. V.—The specific fish so set apart shall be exclusively for the use of the landlord, if caught within the bounds of his fishery, and neither his tenants or others shall be at liberty to appropriate such reserved fish to their private use; but when caught, such reserved fish shall be the property of the landlord, for which he shall be at liberty to sue and recover the value from any fisherman appropriating the same; and, moreover, if he take one fish criminally, he shall pay five, and in that proportion shall he pay to the full amount of what he may have taken wrongfully. Whoever may have taken fish in violation of this law, without paying as above, shall be fined fifty dollars for each offense.

SEC. VI.—The landlords shall not have power to lay any tax or to impose any other restriction upon their tenants regarding the private fisheries than is in the preceding section prescribed, neither shall such further restrictions be valid.

SEC. VII.—It shall be competent to the landlords, on consultation with the tenants of their lands, in lieu of setting apart some peculiar fish to their exclusive use, as hereinbefore allowed, to prohibit during certain indicated months of the year, all fishing of every description upon their fisheries; and, during the fishing season to exact of each fisherman among their tenants, one-third part of all the fish taken upon their private fishing grounds. In every such case it shall be incumbent on the landlords to comply in like manner with the requirements of the fourth section of this article.

SEC. VIII.—The royal fish shall appertain to the Hawaiian Government, and shall be the following, viz.:

1st. The bonito, when off any part of the coast of Lanai.

2d. The albicore of Hawaii.

3d. The mullet of Huleia, Anehola, and Hanalei, the squid and fresh-water fish of Mana on Kauai.

4th. The shoal fish taken at the following places, noted for the abundance of fish frequenting them: Off Oahu: 1, kalia; 2, keehi; 3, kapapa; 4, malaea-kuli, and pahihi.

5th. Off Molokai: 1, punalau; 2, ooia; 3, kawai; 4, koholanui; 5, kaonini; 6, aikoolua; 7, waiokama, and 8, heleiki.

6th. And off Maui: The kuleku of Honuaula, and the same whenever found off said island.

7th. All the following transient fish, viz.: 1, the

kule; 2, the anaeholo; 3, the alalauwa; 4, the uhukai; 5, the kawelea; 6, the kawakawa; 7, the kalaku.

These fish shall be divided equally between the king and fisherman. But on all the prohibited fishing grounds the landlords shall be entitled to one species of fish, and those who have walled fish ponds shall be allowed to scoop up small fish to replenish their ponds. If the prohibited fish of the landlord be mingled with the royal fish, then the landlord shall be entitled to one-third of the whole of the fish taken, though this applies only to Molokai, Oahu, and the rivers of Kauai.

All which shall be yearly protected by the King's taboo, to be imposed by the Minister of the Interior, by means of circular from his department, as prescribed in the act to organize the executive ministry, and during the specified season of taboo they shall not be subject to be taken by the people.

SEC. IX. At the expiration of the taboo season all persons inhabiting these islands shall be at liberty to take the protected fish, accounting to the fishery agents of the respective districts off which the same shall have been caught, for the half part or portion so taken, and the minister of the interior shall make known through his agents, by *viva voce* proclamation, the respective months or seasons of the year during which the said royal fisheries may be used, and the said protected fish taken.

SEC. X. The Minister of the Interior shall appoint suitable and proper fishing agents in the several coast districts of the respective islands, to superintend the fisheries aforesaid, to whom he shall from time to time give directions through the respective governors in regard to the sale or other

disposition of the share of fish accruing to Government.

SEC. XI. It shall be the duty of the agents appointed to exact and receive of all fishermen, for the use of the royal exchequer, during the legalized fishing seasons, the one-half part or portion of all protected fish taken without the reefs, whether at the respective places in the eighth section of this article indicated or in the channels or enclosed seas dividing these islands, or upon the high seas, within the marine jurisdiction of this kingdom. And if any officer or agent of this Government shall exact more fish of the people than is in and by this section expressly allowed he shall, on conviction, forfeit his office and be liable to pecuniary fine, in the discretion of the Court before which he shall have been convicted.

SEC. XII. It shall be competent to His Majesty, by an order in council, from time to time, to set apart any given portion, or any definite kind of the said protected fish, or any proportional part of the avails therefrom arising, for the use of the royal palace, to be delivered or paid over to the chamberlain of his household, created by the third part of this act.

SEC. XIII. It shall be incumbent on the Minister of the Interior to provide, by instructions to the respective governors, for the sale and disposal of all fish received by the said fishing agents, and to pay the avails thereof to the Minister of Finance.

SEC. XIV. If any person shall, in violation of this article, take out of season the fish protected by the King's taboo, or if any person shall, within the free fishing seasons, take any of the protected fish,

without delivering to the agent appointed for that purpose the proportion accruing to the royal exchequer he shall, on conviction, forfeit all fish found in his possession, and shall in addition pay five-fold for all fish thus taken, or he may be put in confinement at the discretion of the Court condemning him.

LAWS OF HAWAII 1851.

An Act

Granting to the People the Rights of Piscary Now Belonging to the Government.

Whereas, The fish belonging to the Government are productive of little revenue; and whereas, the piscary rights of the Government, as managed by the fishing agents, are a source of trouble and oppression to the people.

Therefore,

Be it enacted by the House of Nobles and Representatives of the Hawaiian Islands in Legislative Council assembled:

Section 1. That, thirty days from and after the publication of this act in the Elele and Polynesian newspapers, all fish belonging to or especially set apart for the Government shall belong to and be the common property of all the people, equally; excepting that the two-thirds mentioned in section 8, No. 7, article 5, chapter 6, part 1, of the act to organize the executive departments, shall not be exacted of the konohiki, and in all cases where the konohiki shall set apart one kind of fish only, as per section 4 of said law, such fish shall belong to

the konohiki exclusively, and without division or molestation.

SEC. 2. All fishing grounds appertaining to any Government land, or otherwise belonging to the Government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons: Provided, however, that, for the protection of such fishing grounds, the Minister of the Interior may taboo the taking of fish thereon at certain seasons of the year.

SEC. 3. The Minister of the Interior shall give public notice in the Elele and Polynesian newspapers of any such taboo imposed by him, together with the name of such fish, and no such taboo shall be in force until due notice has been given; any person who shall be found guilty of violating such taboo, upon complaint before any district justice, shall be punished by a fine not exceeding fifteen dollars in the discretion of the Court, and restore all fishes taken or the value thereof.

SEC. 4.—No person, living without the kingdom, shall take any fish within the harbors, streams, reefs, or other waters of the same, for the purpose of carrying them for sale or otherwise, to any place without the kingdom.

SEC. 5.—Every person violating the provisions of the preceding section, may be punished, upon complaint made to any district justice, by a fine not exceeding two hundred dollars, in the discretion of the court.

SEC. 6.—All acts, or parts of acts, resolves, or parts of resolves, contrary to the provisions of this act, shall be, and the same are, repealed.

SEC. 7.—The Minister of the Interior is, hereby, charged with the execution of this act.

Passed by the House of Representatives, this May 15th, 1851.

WM. L. LEE,
Speaker.

Passed by the House of Nobles.

KEONI ANA,
President.

Approved by the King, July 11th, 1851.

KAMEHAMEHA.

LAWS OF HAWAII, 1851.

AN ACT

TO PROTECT THE PEOPLE IN CERTAIN FISHING GROUNDS.

WHEREAS, certain persons to whom Government lands have been sold, have assumed exclusive rights of fishing in the sea adajcent to said land, without the justification of law; and whereas the people in numerous instances, have been unjustly deprived of their rights to fish on the grounds long since made free to them by law, namely, on the fishing grounds commonly known as the *Kilohee Grounds,* the *Luhee Grounds*, the *Malolo Grounds,* and the fishing of the ocean from the reefs seaward, and whereas the present law affords no sufficient protection to the people in those rights.

Therefore:

BE IT ENACTED *by the Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled:*

SECTION 1.—That no person who has bought, or who may hereafter buy, any Government land, or

obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the taboos of the minister of the interior.

SEC. 2.—If that species of fish which has been tabooed by any konohiki, shall go on to the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall only be tabooed when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other.

SEC. 3.—Every konohiki or other person who shall wilfully deprive another of any of his legal rights to fish on any fishing ground which now is, or may become, free to the use of the people, or who shall wilfully exact from another any portion of the fish caught on any public fishing ground, or who shall wilfully exact of another, for the use of any private fishery, a greater amount of fish than by law he is entitled to receive as his share, and any tenant or other person who shall wilfully deprive any konohiki of his fishing rights, by appropriating to himself the tabooed fish of said konohiki, or otherwise, shall be punished by a fine not exceeding one hundred dollars for every such offense, in the discretion of the court, and in default of the payment of said fine, be imprisoned at hard labor until the same is paid.

SEC. 4.—The several district justices of the kingdom shall have the power to try and punish all

offenses against the provisions of the preceding section committed in their respective districts.

SEC. 5.—This act shall take effect ten days from and after the publication of the same in the Elele and Polynesian newspapers.

Passed by the House of Representatives, May 24, 1851.

WM. L. LEE,
Speaker.

Passed by the House of Nobles.

KEONI ANA,
President.

KAMEHAMEHA.

KEONI ANA.

LAWS IN FORCE IN THE HAWAIIAN ISLANDS IN 1859, AND COMPILED IN CIVIL CODE OF THAT YEAR. PAGES 83-85.

OF THE FISHERIES.

SECTION 384. All the fishing grounds appertaining to any government land or otherwise belonging to the government, excepting only ponds, shall be, and are hereby forever granted to the people, for the free and equal use of all persons: Provided, however, that, for the protection of such fishing grounds, the Minister of the Interior may taboo the taking of fish thereon, at certain seasons of the year.

SEC. 385. The Minister of the Interior shall give public notice of any such taboo imposed by him;

and no such taboo shall be in force until such notice has been given. Every person who shall violate such taboo shall be punished by a fine not exceeding fifteen dollars, and the value of the fish taken.

SEC. 386. No person residing within the kingdom shall take any fish within the harbors, streams, reefs, or other waters of the same, for the purpose of carrying them for sale, or otherwise, to any place without the kingdom, under penalty of a fine not exceeding two hundred dollars, in the discretion of the court.

SEC. 387. The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the konohiki, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.

SEC. 388. The konohikis shall be considered in law to hold said private fisheries for the equal use of themselves, and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their konohikis, subject to the restrictions imposed by law.

SEC. 389. The konohikis shall have power each year to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice, by *viva voce* proclamation, and by at least three written or printed notices posted in conspicuous places on the land, to their tenants and others residing on their lands,

signifying the kind and description of fish which they have chosen to be set apart for themselves.

SEC. 390. The specific fish so set apart shall be exclusively for the use of the konohiki, if caught within the bounds of his fishery, and neither his tenants nor others shall be at liberty to appropriate such reserved fish to their private use, but when caught, such reserved fish shall be the property of the konohiki, for which he shall be at liberty to sue and recover the value from any person appropriating the same.

SEC. 391. The konohikis shall not have power to lay any tax, or to impose any other restriction, upon their tenants, regarding the private fisheries, than is hereinbefore prescribed, neither shall any such further restriction be valid.

SEC. 392. It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as hereinbefore allowed, to prohibit during certain months in the year, all fishing upon their fisheries; and, during the fishing season, to exact of each fisherman among the tenants one-third part of all the fish taken upon their private fishing grounds. In every such case it shall be incumbent on the konohikis to give the notice prescribed in section 389.

SEC. 393. No person who has bought, or who may hereafter buy, any Government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land.

SEC. 394. If that species of fish which has been tabooed by any konohiki shall go on to the grounds which have been or may be given to the people, such fish shall not be tabooed thereon. It shall be tabooed only when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other.

SEC. 395. Every konohiki or other person who shall wilfully deprive another of any of his legal rights to fish on any fishing ground, which now is, or may become, free to the use of the people, or who shall wilfully exact from another any portion of the fish caught on any public fishing ground, or who shall wilfully exact of another, for the use of any private fishery, a greater amount of fish than by law he is entitled to receive as his share, and any tenant or other person who shall wilfully deprive any konohiki of his fishing rights, by appropriating to himself the tabooed fish of said konohiki, or otherwise, shall be punished by a fine not exceeding one hundred dollars for every such offense, in the discretion of the Court, and in default of the payment of such fine be imprisoned at hard labor not exceeding three months.

SEC. 396. The several district justices shall have power to try and punish all offenses against the provisions of the last preceding sections committed in their respective districts.

LAWS IN FORCE IN THE HAWAIIAN ISLANDS

At the time of the Passing of the Organic Act by the Congress of the United States.
Penal Laws of 1897, Pages 463-467.

CHAPTER 84.

FISHERIES.

SECTION 1449. All fishing grounds appertaining to any Government land, or otherwise belonging to the Government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons; provided, however, that for the protection of such fishing grounds, the Minister of the Interior may taboo the taking of fish thereon at certain seasons of the year.

SEC. 1450. The Minister of the Interior shall give public notice of any such taboo imposed by him, and no such taboo shall be in force until such notice has been given. Every person who shall violate such taboo shall be punished by a fine not exceeding fifteen dollars and the value of the fish taken.

SEC. 1451. No person residing without the Republic shall take any fish within the harbors, streams, reefs, or other waters of the same, for the purpose of them carrying them for sale, or otherwise, to any place without the Republic, under penalty of a fine not exceeding two hundred dollars, in the discretion of the Court.

SEC. 1452. The fishing grounds from the reefs, and, where there happen to be no reefs, from the

distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the konohikis, whose lands by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.

SEC. 1453. The konohikis shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands, and the tenants shall be at liberty to take from such fisheries, either for their own use, or for sale or exportation, but subject to the restrictions imposed by law, all fish, seaweed, shellfish and other edible products of said fisheries.

SEC. 1454. The konohikis shall have power each year to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice, by *viva voce* proclamation, and by at least three written or printed notices posted in conspicuous places on the land, to their tenants and others residing on their lands, signifying the kind and description of fish which they have chosen to be set apart for themselves.

SEC. 1455. The specific fish so set apart shall be exclusively for the use of the konohiki, if caught within the bounds of his fishery, and neither his tenants nor others shall be at liberty to appropriate such reserved fish to their private use, but when caught such reserved fish shall be the property of the konohiki, for which he shall be at liberty to sue and recover the value from any person appropriating the same.

SEC. 1456. The konohikis shall not have power to lay any tax, or to impose any other restriction, upon their tenants, regarding the private fisheries than is hereinbefore prescribed, neither shall any such further restriction be valid.

SEC. 1457. It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as hereinbefore allowed, to prohibit during certain months in the year, all fishing upon their fisheries, and, during the fishing season, to exact of each fisherman among the tenants, one-third part of all the fish taken upon their private fishing grounds. In every such case it shall be incumbent on the konohikis to give the notice prescribed in Section 1454.

SEC. 1458. No person who has bought, or who may hereafter buy, any Government land, or obtain land by lease or other title, from any party, has or shall have any greater right than any other person, resident in this Republic, over any fishing ground not included in his title, although adjacent to said land.

SEC. 1459. If that species of fish which has been tabooed by any konohiki, shall go on to the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall be tabooed only when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other.

SEC. 1460. Every konohiki or other person who shall wilfully deprive another of any of his legal

rights to fish on any fishing ground which now is, or may become, free to the use of the people, or who shall wilfully exact from another any portion of the fish caught on any public fishing ground, or who shall wilfully exact of another, for the use of any private fishery, a greater amount of fish than by law he is entitled to receive as his share, and any tenant or other person who shall wilfully deprive any konohiki of his fishing rights, by appropriating to himself the tabooed fish of said konohiki, or otherwise, shall be punished by a fine not exceeding one hundred dollars for every such offense, in the discretion of the Court, and in default of the payment of such fine be imprisoned at hard labor not exceeding three months.

SEC. 1461. The several District Magistrates shall have power to try and punish all offenses against the provisions of the last preceding section, committed in their resepctive districts.

USE OF EXPLOSIVES.

SECTION 1462. No person shall use giant powder or any other explosive substance in taking fish within or upon any harbors, streams, reefs, or waters within the jurisdiction of this Republic.

SEC. 1463. The possession by fishermen, fish venders, or persons in the habit of fishing, of fish killed by giant powder or other explosive substance, shall be *prima facie* evidence that the person in whose possession such fish were found used giant powder or some other explosive substance in taking such fish, contrary to the provisions of this Act.

SEC. 1464. Whosoever violates the provisions of this Act shall be punished by a fine not exceeding

one hundred dollars nor less than twenty-five dollars, or by imprisonment at hard labor not exceeding six months, or both, in the discretion of the Court.

SEC. 1465. The several District Magistrates shall have jurisdiction in all cases under this Act.

YOUNG FISH.

SECTION 1466. It shall not be lawful for any person to take, catch, or destroy the young of the fish known as mullet and the awa, under four inches in length, in any of the bays, harbors, waters, or streams of this Republic. Provided, however, that nothing in this act shall prevent the taking of the fish hereinbefore prohibited for the purpose of stocking ponds.

SEC. 1467. It shall not be lawful for any person to sell or offer for sale, or have in his possession, except alive, any of the young fish mentioned in Section 1466.

SEC. 1468. Any person violating the provisions of this Act shall, upon conviction before any District Magistrate, be punished by a fine of not less than twenty nor more than two hundred dollars, or by imprisonment at hard labor for not less than ten nor more than ninety days, or both, such fine and imprisonment in the discretion of the Court. Provided, nevertheless, that no such fine shall be imposed upon any person who, fishing for other fish, accidentally takes or catches not more than forty of the young fish mentioned in Section 1466.

AN ACT TO PROVIDE A GOVERNMENT FOR THE TERRITORY OF HAWAII, PASSED BY THE FIFTY-SIXTH CONGRESS OF THE UNITED STATES OF AMERICA, A. D. 1900.

"SECTION 95. That all the laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons, are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial enclosure, shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this act unless established as hereinafter provided.

"SEC. 96. That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a Circuit Court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the Attorney-General, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

"That if such fishing right be established, the Attorney-General of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States, upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the Treasury of the Territory of Hawaii, not otherwise appropriated."

MAHELE AWARD OF KING KAMEHAMEHA III.

AN ACT RELATING TO THE LANDS OF HIS MAJESTY THE KING, AND OF THE GOVERNMENT.

Page 374, Civil Code, 1859.

Whereas, It hath pleased His Most Gracious Majesty Kamahameha III, the King, after reserving certain lands to himself as his own private property, to surrender and forever make over unto his Chiefs and People, the greater portion of his Royal Domain:

And Whereas, It hath pleased our Sovereign Lord the King, to place the lands so made over to his Chiefs and People, in the keeping of the House of Nobles and Representatives, or such person or persons as they may from time to time appoint, to be disposed of in such manner as the House of Nobles and Representatives may direct, and as may best promote the prosperity of this Kingdom and the dignity of the Hawaiian Crown. Therefore,

Be it Enacted by the House of Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled:

That, expressing our deepest thanks to His Majesty for this noble and truly royal gift, we do hereby solemnly confirm this great act of our good King, and declare the following-named lands, viz.:

NAMES OF LANDS.	AHUPUAA.	DISTRICTS.	ISLANDS.
Puuwaawaa,	Ahupuaa,	Kona,	Hawaii.
Haleohiu,	"	"	"
Puaa,	"	"	"
Onouli,	"	"	"
Honomalino,	"	"	"
Waiohinu,	"	"	"
etc.,	etc.,	etc.,	etc.,

To be the private lands of His Majesty Kamehameha III., to have and to hold to himself, his heirs, and successors, forever; and said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants.

That we do hereby, in the names of the Chiefs and People of the Hawaiian Islands, accept of the following lands, viz.:

NAMES OF LANDS.	AHUPUAA.	DISTRICTS.	ISLANDS.
Puuanahulu,	Ahupuaa,	Kona,	Hawaii.
Kukio 1,	"	"	"
Kukio 2,	"	"	"
Maniniowali,	"	"	"
Mahaiula,	"	"	"
etc.,	etc.,	etc.,	etc.,

(This is known as the great Mahele award, but has been continually held to pass no title to the above lands in any private person unless ratified by the land Commission Board.)

LAWS OF HAWAII OF 1846.

ARTICLE IV.—OF THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES.

SECTION I. His Majesty shall appoint, through the Minister of the Interior, and upon consultation with the privy council, five commissioners, one of whom shall be the attorney-general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all classes of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which Board, unless ap-

pealed from as hereinafter allowed, shall be binding upon the Minister of the Interior and upon the applicant.

SEC. II. The said commissioners shall, before acting, take and subscribe an oath to be administered to them by the Minister of the Interior, in the following form:

> We and each of us do solemnly swear that we will carefully and impartially investigate all claims to land submitted to us by private parties against the government of the Hawaiian Islands; and that we will equitably adjudge upon the title, tenure, duration and quantity thereof, according to the terms of article fourth of the seventh chapter of the first part of an act entitled "An act to organize the executive departments of the Hawaiian Islands," passed at Honolulu, ... day of ....., 18....
>
> Subscribed and sworn to, this ..... day of ....., 18.....
>
> Before me,.....
>
> MINISTER OF THE INTERIOR.

Which oath, having been sworn to, shall remain on file in the Interior Department.

SEC. III. It shall be the duty of said Board of Commissioners to select one of their number as president. They shall have power to employ clerks and copyists for the purposes in this article defined; they shall appoint the time and place of their sessions; shall at pleasure adjourn their meetings, and, when necessary, postpone the business pending before them.

SEC. IV. The President of said Board shall, at least once in each month, from the date of their first convention, report their proceedings to the Minis-

ter of the Interior—the number of claims then pending before them—the number to that date confirmed or rejected and the reasons for confirmation and rejection of any particular claim to land, with all the evidences adduced to and reduced before them.

SEC. V. It shall be the special duty of said Board to advertise in the Polynesian newspaper, during the continuance of their sessions, the following public notice, viz.:

TO ALL CLAIMANTS OF LAND IN THE HAWAIIAN ISLANDS.—The undersigned have been appointed by his Majesty the king a Board of Commissioners to investigate and confirm or reject all claims to land arising previously to the .....day of....., 18..... Patents in fee simple, or leases for terms of years, will be issued to those entitled to the same, upon the report which we are authorized to make, by the testimony to be presented to us.

The Board holds its stated meetings weekly at....., in Honolulu, Island of Oahu, to hear the parties or their counsel, in defence of their claims; and is prepared, every day, to receive in writing, the claims and evidences of title which parties may have to offer, at the ....., in Honolulu, between the hours of 9 o'clock A. M., and 3 o'clock P. M.

All persons are required to file with the board specifications of their claims to land and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date, or in default of so doing, they will after that time be forever barred of all right to recover the same in the courts of justice.

Dated.....day of....., 18.....

SEC. VI. The said Board shall be in existence for the quieting of land titles during two years from the first publication of the notice above required, and shall have power to subpoena and compel the attendance of witnesses by discretionary fine; in like manner, when in session for the hearing of arguments, to punish for contempt; and they shall have power to administer oaths to witnesses, and to perpetuate testimony in any case depending before them, which, when so perpetuated, shall be valid evidence in any court of justice created by the act to organize the judiciary.

SEC. VII. The decisions of said Board shall be in accordance with the principles established by the civil code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy—primogeniture and rights of adoption; which decisions being of a majority in number of said board, shall be only subject to appeal to the Supreme Court, as prescribed in the act to organize the judiciary and when such appeal shall not have been taken, they shall be final.

SEC. VIII. All claims to land, as against the Hawaiian Government, which are not presented to said Board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this kingdom, and have no representative therein.

SEC. IX. The Minister of the Interior shall issue patents or leases to the claimants pursuant to the

terms in which the said Board shall have confirmed their respective claims, upon being paid the fees of patenting or of leasing (as the case may be) prescribed in the third part of this act, unless the party entitled to a lease shall prefer to compound with the said Minister as in the succeeding section allowed.

SEC. X. The Minister of the Interior shall have power in concurrence with the Privy Council, and under the sanction of His Majesty, to issue to any lessee or tenant for life of lands so confirmed, being an Hawaiian subject, a patent in fee simple for the same, upon payment of a commutation to be agreed upon by His Majesty in privy council.

SEC. XI. The patents and leases issued in accordance with the award of said commissioners, shall be recorded at the expense of the patentee or lessee, as prescribed in the third part of this act, in a book kept for that purpose by the Minister of the Interior.

SEC. XII. The said Board shall not have power to entertain any claim to lands set up by any private person or persons until the claimant shall have deposited with the Minister of Finance a bond conditioned to defray the costs and expenses incident to the proposed investigation, according to the rates of charge prescribed in the third part of this act; which costs and expenses shall, after award rendered, be taxed by the President of said Board, and a certificate thereof shall be given to the claimant, who shall exhibit the same to the Minister of Finance, whose certificate of full payment, together with the award of the commissioners, shall authorize the delivery of the awarded patent or lease to such confirmed claimant, by the Minister of the Interior, and not without.

SEC. XIII. The titles of all lands claimed of the Hawaiian Government anterior to the passage of this act, upon being confirmed as aforesaid, in whole or in part by the Board of Commissioners, shall be deemed to be forever settled, as awarded by said Board, unless appeal be taken to the Supreme Court, as already provided. And all claims rejected by said Board, unless appeal be taken as aforesaid, shall be deemed to be forever barred and foreclosed, from the expiration of the time allowed for such appeal.

LAWS OF HAWAII OF 1847.

PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES, IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM.

When the islands were conquered by Kamehameha I, he followed the example of his predecessors and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his hands, to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again, after passing through the hands of four, five, or six persons, from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.

The tenures were in one sense feudal, but they were not military, for the claims of the superior on

the inferior were mainly either for produce of the land or for labor, military service being rarely or never required of the lower orders. All persons possessing landed property, whether superior landlords, tenants, or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also service, which was called for at discretion, on all the grades from the highest down. They also owed and paid some portion of the productions of the land, in addition to the yearly taxes. They owed obedience at all times. All these were rendered not only by natives but also by foreigners who received lands from Kamehameha I and Kamehameha II, and by multitudes still alive; of this there are multitudes of living witnesses, and a failure to render any of these had always been considered a just cause for which to forfeit the lands.

It is therefore certain that the tenure was far from being allodial, either in principal or practice; but even if living testimony were wanting at the present time, the treaty established in 1836 between this government and Lord Edward Russell, on behalf of the British Government, would show the views then entertained on the subject by the contracting parties. It is there declared, "The land on which the houses are built is the property of the King." The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land; the King really owning the allodium, and the person in whose hands he placed the land holding it in trust. But when he put it in the hands of a third person, that third person bore a similar relation to him that he did to the King. The superior always had the power at pleasure to

dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords, when changes were often numerous, and the rights of heirs and tenants comparatively disregarded, for the purpose of favoring a new class of persons.

Such was the nature of the tenures, and such the titles by which the lands were held, when in 1839 protection was declared both for person and property, in the following words: "Protection is hereby secured to the persons of all the people, together with their lands, their building lands, and all their property." (See Declaration of Rights, p. 10 of translation.) In section 6 of the same act, p. 33, the nature of the protection given to landed property is in some degree defined. It is there declared that the landlord cannot "causelessly dispossess his tenant," and it is also stated what shall be considered a sufficient cause. The same law confirms what has been already stated in relation to the rights of his Majesty the King in all lands. Section 3 requires that every tenant of land, by whomsoever owned, shall work thirty-six days in the year for the King or government, showing clearly that there is no individual who has an allodial title to the soil, the title remaining with the King.

It seems natural then, and obviously just, that the King, in disposing of the allodium, should offer it first to the superior lord, that is, to the person who originally received the land in trust from the King; since, by so doing, no injury is inflicted on any of the inferior lords or tenants, then being protected by law in their rights as before; and most obviously the King could not dispose of the allodium to any other person without infringing on

the rights of the superior lord. But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchases the allodium, can no more seize upon the rights of the tenants and dispossess them than the King can now seize upon the rights of the lords and dispossess them. This appears clear, not only from the first principles of justice, but also from the act of 1839, declaring protection for tenants as well as for landlords. That act particularly recognizes but three classes of persons as having rights in the sale, viz.: the King or government, the landlords and the tenants. Indeed, section 9, chapter 3, of that statute, positively forbids the lord who receives land in trust from the King to place another lord under himself, over the tenants. If then any landlord violate this law, he only divides his own rights; he cannot thereby diminish the rights of the King or government, nor the rights of the tenants.

It being therefore fully established that there are but three classes of persons having vested rights in the lands—1st, the government; 2d, the landlord, and 3d, the tenant, it next becomes necessary to ascertain the proportional rights of each. Happily, evidence on this point is not wanting, though it may be the most difficult one to settle satisfactorily of any connected with land claims. The testimony elicited is of the best and highest kind. It has been given immediately by a large number of persons, of a great variety of character, many of them old men perfectly acquainted with the ancient usages of the country; some were landlords

and some were tenants. There has been no contradictory testimony, but all have agreed on all essential points. Several foreign landholders under Kamehameha I, Kamehameha II, and Kamehameha III, have been full in their testimony as to the rights of the King. Ancient practice, according to testimony, seems to have awarded to the tenant less than justice and equity would demand, and to have given to the King more than the permanent good of his subjects would allow. If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself, he most assuredly has a right to do it; and should the King allow to the landlord one-third, to the tenant one-third, and retain one-third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself; and in giving this opinion, the witnesses uniformly gave it against their own interests. According to this principle, a tract of land now in the hands of a landlord and occupied by tenants, if all parts of it were equally valuable, might be divided into three equal parts, and an allodial title to one then be given to the lord, and the same title be given to the tenants of one-third, and the other third would remain in the hands of the King, as his proportional right. It is altogether probable that since the act of 1839 a few individuals may have acquired allodial ownership of landed property, either by purchase or by voluntary grant on the part of the King. Such ownership must be proved or it cannot be acknowledged, for the King, representing the government, having formerly been the sole owner of all the soil, he must be considered to be so still, unless proof be rendered to the contrary; and even possession of ever so long standing cannot be proof, anything more

than that which is specified above as belonging to the landlord, or to the landlord and tenant, as the case may be.

All the above principles and remarks apply most particularly and clearly to districts, plantations and farms, and to their owners.

But between the ownership of lands for cultivation, and mere building lots, there are often broad lines of distinction. Mere building lots were never bestowed by the King or lords for the purpose of being given out to tenants, as was uniformly the case with lands suitable for cultivation. It follows therefore that (with some exceptions, which in all cases must be proved) in relation to building lots, there is no third class of persons having the rights of lords over tenants. The exceptions would be in those cases where individuals, having received building lots from the King for their own particular use, those individuals have themselves for some considerations, expressed or implied, transferred such lots to third parties. Another exception exists in relation to building lots, especially if large, which were formerly within the defined boundaries of plantations and farms, and have since been occupied by persons owning no rights in the farms other than the building lots. Such lots must still be considered a part of the plantation or farm, in such a sense that the tenant must pay rent to the lord. This appears clear, not only from ancient usage, but also from the last clause of section 7, of chapter 3, old laws: "But possessions of house lots that are large, like farm gardens, must aid the owners of the farms from which they are taken in payment of the yearly tax."

Although the above facts and principles are most perfectly clear and unquestionable, yet great evils have existed down to the present moment, owing

mainly to the circumstances that several different classes of persons had undivided rights in the same land, and each class was very liable to claim more than the due proportions. In such cases, lords, or persons of superior power or rank, have generally been the oppressors, and perhaps there are none of those classes, from the throne down, who have not sometimes taken advantage of the powerless in this respect. Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

The decisions of an executive board would be so far surrenders of the Chief Executive Magistrate, who has approved the powers conferred upon that board, as to be an authorization from him to adjust all the past tenures in the manner most equitable, and if abstractly just, power to alienate for him any rights which he as King could surrender in regard to these lands. The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the Commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands, are the following:

1st. To punish for high treason by forfeiture, if so the law decrees.

2nd. To levy taxes upon every tax yielding basis, and among others lands, if so the law decrees.

3d. To encourage and even enforce the usufruct of lands for the common good.

4th. To provide public thoroughfares and easements, by means of roads, bridges, streets, etc., for the common good.

5th. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.

These prerogatives, powers and duties his Majesty ought not, and, *ergo*, he cannot, surrender. Hence the following confirmations of the board, and the titles consequent upon them must be understood, subject to these conditions.

But the King's private or feudatory rights, understood by the natives, differ greatly from the above enumerated rights, understood in civilized and refined nations, and in which the commonwealth is rather represented by the person of the monarch than the monarch himself. By the ancient usage, the taxes went not to the body corporate, in trust for political uses, but to the King, as his private income or revenue, and this gave him a private proprietorship in all lands. This autocracy was, however, diminished by the King's liberal and voluntary surrender to his people in the Constitution, 8th October, 1840, in which the government or body politic and the King are for the first time contradistinguished as follows: "He (the King) also shall have the direction of the government property, the poll tax, the land tax, the three days monthly labor, though in conformity to the laws. He also shall retain his own private lands, and lands forfeited for the non-payment of taxes shall

revert to him," in which clause is perceivable the line of distinction above adverted to. All that is essential to the common good in regard to lands, taxes on lands, and revenue from lands, is reposed in the King, as the head of a corporation aggregate; or in himself as a corporation sole, and from these is contradistinguished his own private lands.

In the spirit of this constitutional distinction, on the 7th of June, 1839, the Nobles, with the sanction of the King, passed some ordinances or rules "respecting applications for farms, forsaking of farms, disposing of farms, and the management of farms," having in view the encouragement of industry. In these the landlords are recognized as a distinct and *independent class* of local proprietors over such portions of their lands as are actually in cultivation, subject to the claims of their tenantry; and as to those lands not in actual use, it gives a community of ownership between the government and landlords, by saying, "Those men who have no land, not even a garden, nor any place to cultivate, and yet wish to labor for the purpose of obtaining the object of their desires, may apply to the land agent, or the governor, or the King, for any piece of land which is not already cultivated by another person, and such piece shall be given him."

This appropriation was to be with the co-operation of the King and the landlords. In like manner the corporate right is recognized in what the same law declares respecting the "residuum lands," and "respecting landlords."

Yet the principle of suzerainship seems to have followed the King in those lands which are otherwise declared to be the proper possession of the landlords, for the "advice to the governors and landlords" commences with "It shall be the duty of those to whom the King gives lands to see that they

do not establish other landlords, under themselves, over the people;" and in the 18th section, landlords are cautioned lest they "be dispossessed, according to the principles of the eleventh section," which makes the landlords' right of possession dependent upon industry and intelligence.

It would thus seem inferable, that as late as the 7th of June, 1839, and before the Constitution was given, the chiefs considered themselves tenants at special will of the King as the head of the nation, or in his corporate right. Also that that corporate right to dispossess them was only to be exercised for causes of a public nature, inconsistent with the public well being. To suppose that the landlords could be lawfully dispossessed by the King at will, for causes of private pique, or because of personal disfavor, would be to make the King the real or intrinsic owner of the land in his individual capacity, a doctrine neither sustained by the current of past legislation nor the testimony which has already been elicited by the Board. But to recognize his right of forfeiting the lands of the landlords for misuser or non-user, or for crime, is itself a recognition beneficial to the mass of the people, for whose happiness the corporation is instituted.

The Hawaiian rulers have learned by experience that regard must be had to the immutable law of property, in things real, as lands, and in things personal, as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim. They perceive by contact with foreign na-

tions that such is their uniform practice, and that the rules of right under that practice are contended for, understood, and likely to be applied, in regard to the lands otherwise held at their hands by a tenancy incomprehensible to the foreigner. They are desirous to conform themselves in the main to such a civilized state of things, now that they have come to be a nation in the understanding of older and more enlightened governments.

Such we, the Commissioners, understand to have been the reason of the distinction in the Constitution of 1840, between Government lands and private lands of the King, and such we now understand to be the spirit of article 4th, chapter 7th, of the first part of the act to organize the executive departments of the Hawaiian Islands, founded upon the Law Report of May 21, 1845, in which it was recommended to prepare his Majesty's Government to consort in some measure with the recognizing powers. In consequence, it was enacted that the King is to appoint five commissioners for quieting land titles, and thus confer upon them all his private and public power over the corporate property in lands claimed by private parties, which in the nature of things he can delegate.

The requisition to appoint such a Board is found i nthe fourth article of the 7th chapter of the first part of an act of the legislature, passed on the 10th of December, 1845, which took effect on the 7th of February following. The statute of which said article is a part, is as a whole denominated "An act to organize the executive departments," indicating that the decisions of the Board are not purely judicial, but executive adjudications. The act as a whole in five parts passed its final reading and received the approbation of his Majesty, on the

27th of April, 1846, and was promulgated on the 20th June following.

The Board of Commissioners thus instituted was organized in strict conformity with the law, which having taken effect on Saturday, the 7th of February, the Minister of the Interior, on Monday, the 9th, in privy council, with the approbation of his Majesty, appointed and commissioned the undersigned, who at the same time in the presence of the King and Council, took and subscribed the following oath of office:

"We, and each of us, do solemnly swear, that we will carefully and impartially investigate all claims to land submitted to us by private parties against the Government of the Hawaiian Islands; and that we will equitably adjudge upon the title, tenure, duration and quantity thereof, according to the terms of article 4th of the 7th chapter of the first part of an act entitled 'An act to organize the executive departments of the Hawaiian Islands,' passed at Honolulu, the 10th day of December, 1845.

"(Signed) WILLIAM RICHARDS,
" JOHN RICORD,
" J. Y. KANEHOA,
" JOHN II.
" Z. KAAUWAI."

"Subscribed and sworn to this 9th day of February, 1846, before me,

JOHN YOUNG,
Minister of the Interior."

On the 11th of February, the day following their appointment, the Commissioners organized as follows:

"NOTICE.

"At a meeting of the Board of Commissioners appointed to quiet land titles, having in view the proper organization required and allowed by article 4th of chapter 7th of the first part of an act entitled 'An act to organize the executive departments of the Hawaiian Islands.'

"The members of said Board having convened, it was

* * * * * * * * * *

"4th. That claims submitted for settlement be taken up and acted upon according to the order of their presentation, and be settled according to order taken in each case by a majority in number of the Board.

"5th. That the stated meetings of this Board be held on Wednesday of each week, commencing at 9 o'clock a. m., at the said office at Hale Kauwila, in Honolulu, for the transaction of business. The first meeting to be held on the 4th day of March next.

"6th. That these resolutions be published in the Polynesian newspaper, concurrently with the notice to claimants required by law, to the end that they may be apprised of these by-laws established by the board.

"Done at Honolulu, this 11th day of February, A. D. 1846.

"(Signed)	WILLIAM RICHARDS,
"	JOHN RICORD,
"	J. Y. KANEHOA,
"	JOHN II.
"	Z. KAAUWAI."

Which resolutions were published in the Poly-

nesian of the 14th February, 1846, together with the following notice, required by law:

"To All Claimants of Lands in the Hawaiian Islands.

"The undersigned have been appointed by his Majesty the King, a Board of Commissioners to investigate and confirm or reject all claims to land arising previously to the 10th day of December, A. D. 1845.

"Patents in fee simple, or leases for terms of years, will be issued to those entitled to the same, upon the report which we are authorized to make by the testimony to be presented to us.

"The Board holds its stated meetings weekly, at the Hale Kauwila, in Honolulu, on the Island of Oahu, to hear the parties or their counsel in defence of their claims, and is prepared every day to receive in writing the claims and evidences of title which parties may have to offer, at the office of Joseph Henry Smith, Esq., Secretary of said Board, at Hale Kauwila, in Honolulu, between the hours of 9 A. M. and 3 P. M.

"All persons are required to file with the Board by depositing with its Secretary specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date; or in default of so doing, they will after that time be forever barred of all right to recover the same in the courts of justice.

"Dated 11th day of February, 1846.

"(Signed) WILLIAM RICHARDS,
" JOHN RICORD,
" J. Y. KANEHOA,
" JOHN II.
" Z. KAAUWAI."

1st. The field of the Commissioners is "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of the Act," of which Article 4th is an integral portion, to wit, 27th April, 1846.

2nd. The more minute powers of the Board for organization, and to carry out these objects, are specified and conferred; as the power to meet and adjourn, to appoint clerks, to summon parties and enforce mandates, to administer oaths, and to issue commissions for taking testimony. These are auxiliary to the powers and objects of the Board respecting land titles, which it is created to confirm or reject definitively.

3d. The principles by which the Board are to be governed in deciding certain questions (i. e.,), "Prescription occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and sub-tenancy, primogeniture, and rights of adoption," are to be those "Established by the civil code of the kingdom," which the general provisions of the Act to organize the Executive departments, section 3d, defines as follows: "Until the passage of the civil code, the principles of the foregoing Act, and the prescriptions of all the civil statutes now existing, not at conflict therewith, shall serve and be binding as a civil code for this kingdom, of which the courts of justice shall take notice, in administering the rights to which they are applicable."

A wide latitude is thus left to the Commissioners, who must, in passing upon the merits of each claim, first elicit from creditable witnesses, the facts or history of each; and thus assort or reconcile those

facts to the provisions of the civil code, whenever there is a principle in past legislation applicable to the point under consideration; but when no such principle exists, they may judicially declare one, in accordance with ancient usage and not at conflict with any existing law, nor at variance with the facts, and altogether equitable and liberal.

4th. From the fact that his Majesty, the intrinsic proprietor, has reposed in this Board, such power of confirming or rejecting, the Commissioners must infer that he intended the utmost liberality to prevail towards the claimants, rather against the pecuniary interests of the body politic than against those of the claimants. But,

5th. The Commissioners do not understand that in virtue of such latitude, they are at liberty to disregard certain restrictions contained in the same Act, by the 4th Article of the 7th chapter of the first part of which they are created. For the same legislature by whose authority they exist, has elsewhere limited them as follows:

1st. Aliens are not allowed to acquire any allodial or fee simple estate in lands.

2d. No leasehold estate shall be considered validly acquired by any alien "until he shall have obtained a certificate of nationality, as in this" the first article of chapter 5th required.

6th. The Commissioners are only authorized by the Act to ascertain the claimant's kind and amount of title, and to award for or against that title, "wholly or in part." They are not authorized to grant leases or patents, or to receive the commutation allowed by section 10th. Yet since the government share in the land confirmed has intimate connection with the amount of the claimant's title,

the Commissioners must ascertain and report upon that share, for the guidance and information of the Minister of the Interior.

7th. Connected with each claim for land is its configuration and superficial contents, without the ascertainment and demarcation of which it were possible to make an award, or to quiet the title as between neighboring proprietors. The Board is therefore under the necessity of causing each piece of land to be surveyed at the claimant's expense, before awarding upon it. This is clearly contemplated by the 12th section of the law, among the "expenses incidental to the proposed investigation."

The following benefits will result from these investigations and awards:

1st. They will separate the rights of the King and Government hitherto blended, and leave the owner, whether in fee, or for life, or for years, to the free agency and independent proprietorship of his lands as confirmed. So long as the King or Government continue to have an undivided proprietory share in the domain, the King's and Premier's consent is necessary, by the old law, to real sales, or transfers from party to party, and, by parity of reasoning, to real mortgages also. This is because of the share which Government or the body politic has in the lands of the kingdom uniformly. To separate these rights, and disembarrass the owner or temporary possessor from this clog upon his free agency, is beneficial to that proprietor in the highest degree, and also to the body politic; for it not only sets apart definitely what belongs to the claimant, but, untying his hands, enables him to use his property more freely, by mortgaging it for com-

mercial objects and by building upon it, with the definite prospect that it will descend to his heirs. This will tend more rapidly to an export, and to a permanency of commercial relations, without which there can never be such a revenue as to enable the Government to foster its internal improvements.

2d. The patents or leases given to claimants are for certain fixed and ascertained extents or dimensions of land. This must prevent after-litigation in regard to boundaries. All parties having been cited before awarding, there can be no counter claims to the same piece of land after award, except on appeal, and such appeal cannot be taken except by a party who has presented his claims to the Board.

The patents and leases are recorded in duplicate in the Department of the Interior. This will enable the foundation of every one's right to be known to the Government and inquiring parties. No pretended ownerships can exist without the means of undeceiving the public in regard to them. Subsequent purchasers and mortgagees need not be in ignorance of prior defects in the title, or of prior incumbrances.

The undersigned deem the foregoing prefatory remarks and explanations necessary to a clear understanding of the awards upon which they are about to enter, and indispensable to which awards it is necessary to lay down the following general principles, to which they have arrived by critical study of the Civil Code, and careful examination of numerous witnesses, among whom are some of the oldest chiefs, possessing large tracts of land which, equally with other lands, come under the

adjudication of the Board, and under the principles here laid down.

The chiefs so situated cannot have a personal interest in testifying to the facts leading to these principles, since they thereby clog their own rights and become liable to pay the commutation to which the King and Government are entitled. Native proprietors and foreign residents are thus put upon the same footing in regard to their titles, in consistency with Article 2d of the treaties concluded with Great Britain and France, 26th March, 1846.

1st. For the purposes of this Board in all cases where the land has been obtained from the King or his authorized agent without a written voucher, anterior to the 7th of June, 1839, the Board will inquire simply into the history of the derivation, and if the land claimed has been continuously occupied, built upon, or otherwise improved since that time, without molestation, the Board will, in case no contests exist between private claimants, infer a freehold less than allodial.

2d. In all such cases as above specified, when there are counter claims to the same piece of land, the Board will confine their inquiry to which of the claimants has the freehold, less than allodial.

3d. In all cases where the land has been obtained from the King or his authorized agent, or from any governor, chief, or pretended proprietor, subsequently to the 7th of June, 1839, the Board will strictly enquire into the right of the King, or chief, or landlord, to make such disposition of the land; and will confirm or reject, according to the right of such donor, grantor, or lessor, regardless of consideration, occupancy, or after improvements.

4th. In all cases where the land has been legally and validly obtained from the lawful proprietor, by written grant, deed, or lease, the Board will construe the claimant's rights by the wording of the instrument.

5th. When rights are originally acquired either in writing or verbally, in a lawful manuer and from the *bona fide* owner, for a valid consideration or otherwise, and yet were never occupied or have not been occupied by such claimant since the 7th of June, 1839, the Board will infer an absence of title. Especially in view of section 6, chapter 3, old law.

6th. The share of government, or the body politic, to be commuted for with the Minister of the Interior, by any confirmed claimant wishing to obtain a fee simple title under chapter 7 of part first of the Act to organize the Executive Departments, this Board understand, from the evidence adduced before them, to be one-third part of the value of the land, without improvements, which third part of unimproved value being paid by the confirmed claimant, should extinguish the private rights of the King in the land, and leave such claimant an allodium, subject to the corporate rights of the body politic, to be exerted by the King under authorization of the laws, and through the agency of his officers created by the laws. The Board, in asserting this principle, do not mean, however, to restrict the power of His Majesty in privy council, to fix upon a less commutation, under section 10th of the article creating this Board, and subject to the private rights of tenants, if there be any on the land; for the King has no power to convey away the rights of individuals without their consent.

They deem it their duty to state the maximum value of the interest retained in all lands of the kingdom at this date, which was never relinquished, and which the government to this day has never received any valuable consideration for, even from the private chiefs from whom the claimants derive. Claimants cannot derive more than the original proprietor had, neither could the original proprietors grant more than they had to the present claimants. They had a possessory right under the crown equal to two-thirds undivided of the value of the land, provided there were no tenants; and in consideration of the undivided third of the King, they paid an annual rent in produce of the soil and in service. The foreign claimants deriving from these, have not, in all cases, paid the rent which was due from their grantors, and have lost sight of the corporate rights in their lands, pertaining originally to the government. That rent can be sold by the Minister of the Interior for not exceeding one-third of the unimproved value of the land as aforesaid, which would divest the land so commuted for of all interference save that of the community, for the causes and in the way aforesaid.

7th. The titles of all lands, whether rightfully or wrongfully claimed either by natives or foreigners in the entire kingdom, which shall not have been presented to this Board for adjudication, confirmation, or rejection, on or before the 14th day of February, 1848, are declared to belong to this government, by section 8th of the article creating this Board. Parties who thus neglect to present their claims, do so in defiance of the law, and cannot complain of the effect of their own disobedience.

Upon these principles the undersigned proceed to take up the claims now before them in the order of their presentation.

(Signed) WILLIAM RICHARDS,
" JOHN RICORD,
" J. Y. KANEHOA,
" JOHN II,
" Z. KAAUWAI.

Hale Kauwila, August 20, 1846.

DECISION OF HAWAIIAN SUPREME COURT IN CASE AT BAR.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM C. SMITH, SAMUEL M. DAMON and ALFRED W. CARTER, Trustees under the will of BERNICE P. BISHOP, deceased,

vs.

THE TERRITORY OF HAWAII.
SAMUEL M. DAMON

vs.

THE TERRITORY OF HAWAII.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiffs commenced these actions under Sec. 96 of the Organic Act for the purpose of establishing an exclusive right to the fisheries of Waialae-iki and Moanalua, Island of Oahu.

In the first case the plaintiffs as trustees of the Bishop estate claim a vested right as sole and exclusive owners in fee simple of the sea fishery, same not being a pond or artificial enclosure, situated within the reef adjoining the land of Waialae-iki, setting out a description by metes and bounds; and further allege in their petition that plaintiffs' claim consists of the right each year to set apart for themselves for their sole and exclusive use within the fishing grounds described, one species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use to prohibit, upon consultation with the tenants of their land, all fishing within such fishery during certain months of the year; and during the fishing season

to exact from each fisherman one-third of all the fish taken upon said fishing ground; that from time immemorial the plaintiffs and their grantors by ancient custom and prescription have had an exclusive fishery within the bounds set out, subject only to the rights of tenants on the land of Waialae-iki; that the said fishery was originally appurtenant to the land of Waialae-iki, awarded to A. Paki by Apana 3 of Land Commission Award No. 10,613 and confirmed by Royal Patent No. 3578; and that plaintiffs claim an absolute estate in fee simple in said fishery by purchase under various mesne conveyances.

In the second case the plaintiff makes a similar claim to the fishery situated at Moanalua, and also sets up an additional ground for the claim of right, i.e., that the said fishery was confirmed to L. Kamehameha by Royal Patent No. 7858, under whom the plaintiff claims an absolute estate in fee simple in said fishery by purchase through various mesne conveyances and by descent.

The cases were tried to a jury in a Circuit Court. In the first the Judge granted defendant's motion for non-suit at the close of plaintiff's evidence. In the second, a verdict was directed for the defendant. The plaintiffs excepted and come to this court on bills of exceptions. The cases were argued and submitted together.

In the first case the claim of the plaintiffs is based on three grounds, to-wit: (1) That the right claimed is an appurtenance to their land; (2) that it is based on prescription, or (3) on Ancient Hawaiian custom, while in the second case these three grounds are relied on and an additional claim for the right is made, i.e., a grant from the King.

It is contended on behalf of the Territory, and

the ruling of the Circuit Judge seems to have been based on this theory, that in the second case the patent for the land of Moanalua does not grant the fishery to the patentee, and in both cases that the plaintiffs did not and could not acquire an exclusive right in the fisheries by prescription or by ancient custom, and that whatever right they enjoyed in the fisheries on June 14th, 1900, the time of taking effect of the Organic Act, was derived from the Hawaiian Statutes on the subject of fisheries, and that these were public statutes or laws under which no one could acquire a vested right, and that when the statutes were repealed all of the rights and privileges of the plaintiffs in the said fisheries were abrogated and annulled.

The provisions of the Organic Act on the subject are as follows: "Section 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial enclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act, unless established as hereinafter provided."

Section 96. "That any person who claims a private right to any fishery shall, within two years after the taking effect of this act, file his petition in a Circuit Court of the Territory of Hawaii, setting forth his claims to such fishing rights, service of which petition shall be made upon the Attorney-General, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established, the Attorney-General of the Territory of Hawaii may

proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the Treasury of the Territory of Hawaii not otherwise appropriated."

The question of greatest difficulty presented by these cases is to determine whether or not the rights of the plaintiffs in the respective fisheries were properly "vested rights" within the saving clause of Section 95, of the Organic Act.

By the common law the title and dominion of the sea and navigable rivers and arms of the sea within the Territorial jurisdiction were in the King, who held the same in trust for his subjects, who had a common right of navigation and fishery therein. This jurisdiction was held to extend one marine league from the beach at low water mark. 2 Blackstone, 52; Gould on Waters, Sec. 3; Rogers vs. Jones, 1 Wend., 237 at 256; Shively vs. Bowlby, 152 U. S., 1; The King vs. Parish, 1 Haw., 58.

Although the claim to an exclusive right in a sea fishery has been the subject of much litigation and of conflicting decisions the weight of authority seems to hold that at common law such a right might be acquired by grant or by prescription which presumes a grant. Gould on Waters, Sec. 189, and cases cited in note: Rogers vs. Jones, supra.

The Supreme Court of New York has held that by the common law the King had the right to grant the soil under navigable water, and with it the exclusive right of fishery. Brookhaven vs. Strong, 60 N. Y., 56. A grant made by a Colonial Governor and confirmed by Act of Assembly was held to vest

the title to an exclusive fishery in the grantee. Robins vs. Acherly, 91 N. Y., 98. The holding of the New York Courts on this question was followed by the Supreme Court of the United States in Lowndes vs. Huntington, 153 U. S., 1.

It is said by WOODWORTH, J., in the case of Rogers vs. Jones, supra, "It is well known that numerous grants have been made from time to time by the Commissioners of the Land Office of lands under the waters of the Hudson, all of which have proceeded on the ground that it was the undeniable right of the people of this State to make such grants. Until very lately, I have not understood that the power was questioned. It is here proper to observe that this principle does not at all conflict with the doctrine laid down by writers on national law, who declare the air, running water, the sea, etc., are common property (Vattel, b. 1, Ch. 23, Sec. 280, 287. Grotius, b. 2 Ch., Sec. 3.) The same writers, however, admit that the various uses of the sea near its coast render it very susceptible of property; and rivers are susceptible of property, because confined in banks; such places may be appropriated by the people to whom they belong and the productions within reach, in the same manner as the land they inhabit." P. 156.

Kamehameha III., who ruled the Hawaiian Islands before there was any written laws or Constitution, as well as after the adoption of a written Constitution, was in the fullness of the common law phrase "the universal lord and original proprietor of all lands in his kingdom." He was the source of title. He could give and take from. His will was law. None of his people held allodial titles prior to 1840. There is little, if any, doubt that he had the power to grant exclusive fisheries to any of his subjects if he desired to do so (Territory vs.

Liliuokalani, Ante., 88; Brown vs. Spreckles, Ante., 400), although there is a declaration by Chief Justice Judd that tends strongly to indicate that this Court at that time (1899) held to the contrary view. "The people of Hawaii," said the Chief Justice, "hold the absolute rights to all its navigable waters and the soil under them for their own common use (See Martin vs. Waddell, 14 Pet., 410). The lands under navigable waters in and around the Territory of the Hawaiian Government are held in trust for the public use of navigation. Stockton vs. Baltimore & N. Y. R. R., 32 F., 9;" King vs. Oahu Railway & Land Co., 11 Haw., 725.

Admitting that the plaintiffs might have obtained the right claimed by grant, the question arises, Did they acquire such right? Such a grant would be against the public right and under the well established rule of construction requiring all such grants to be construed most strongly against the grantee it follows that such right, if it exists, must appear by express terms of the grant.

Much was said at the hearing and in the briefs relative to these islands surrounded by the sea, teeming with food for the inhabitants, and of the relative importance of the products of the sea to the life of the people over those of the land. All this was and is of much interest, but it does not appear how it in any material way leads to a solution of the issues presented. Since it appears that whatever the customs may have been or the rights and privileges enjoyed by the chiefs, nobles and common people in the fisheries prior to the year 1839, at that time they were all revoked and cancelled, and a statute passed to regulate and govern them.

The first written law on the subject of fisheries

in these islands was adopted by the King, nobles and chiefs on the 7th day of June, 1839. In this statute it is declared that,

"His Majesty the King hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords, and a portion he reserves to himself." And further, that,

"These are the fishing grounds which his Majesty the King takes and gives to the people: The fishing grounds without the coral reef, viz.: The Kilohee grounds, the Lohee grounds, the Malolo grounds, together with ocean beyond.

"But the fishing grounds, from the coral reef to the sea beach, are for the landlords and for the tenants of their several lands, but not for others."

An examination of this Act (Chap. 3, Laws of 1839) will show that it was intended to govern the subject of fisheries completely. Experience demonstrated that it was incomplete and various amendments were adopted on April 1st, 1841. Again, in 1845, another act was passed on the subject more clearly defining the rights of the several parties. Section 1 of this last Act defines the fishing grounds of the people to be "The entire marine space without and seaward of the reef upon the coast of the several islands," etc. Section 2 of this Act reads, "The fishing grounds from the reefs, and where there happens to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall in like manner be considered private property of the landlord whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries the said landlords shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth.

"Sec. 3. The landlord shall be considered in like manner to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions in this article imposed."

The other sections give the landlords the right each year to set apart for themselves one specie or variety of fish natural to the fishery and to give public notice of this fact by proclamation, etc., and fixing penalties against landlord and tenant for violation of the Act. Also defines the species of fish designated as the royal fish and prescribes that these shall appertain to the government and for a division of them between the King and the fishermen, and makes extensive provisions relative to the "King's taboo," etc.: providing for the appointment of the fishery agents to "exact and receive of all fishermen for the use of the royal exchequer during the legalized fishing seasons the one-half part or portion of all protected fish taken without the reefs," etc.

Time and experience demonstrated to the satisfaction of the King that it was not profitable for the government to engage in the fishing business, so on July 11, 1851, the King approved an act granting to the people the rights of piscary belonging to the government. The second section of this Act reads: Sec. 2. "All fishing grounds pertaining to any government land, or otherwise, belonging to the government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons; provided, however, that for the protection of such fishing grounds the Minister of the Interior may taboo the taking of fish thereon at certain seasons of the year."

Another Act was passed the same year (1851),

entitled "An Act to protect the people in certain fishing grounds," and reads in part as follows: "Section 1. That no person who has bought or who may hereafter buy any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person resident in this kingdom over any fishing grounds not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the taboo of the Minister of the Interior.

"Section 2. If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been or may be given to the people, such fish shall not be tabooed them. It shall only be tabooed when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other."

The Civil Code of 1859 embraced all the laws then in force in the islands on the subject of fisheries. Section 384 of the Civil Code is a verbatim copy of Sec. 2 of the Act of 1851, above quoted, and Sec. 387 is a copy of Sec. 2, of the Act of 1845, except the word "konohiki" is substituted for the word "landlord," used in the original enactment. The other sections hereinbefore quoted were included in this Chapter of the Civil Code. All of these laws without material change were carried forward and are published as Chapter 84 of the Penal Laws of 1897. These Statutes on the subject of fisheries had been in force some of them for more than half a century and all of them for most of that time, when repealed by Sec. 95 of the Organic Act, June 14, 1900.

It is clear from a review of these statutes that the following are necessary inferences, to wit: That the plaintiffs cannot base any claim to the fisheries on ancient custom or prescription; that no right that they may have possessed can antedate the Act of 1839; that all right in the fisheries of whatever nature that had been enjoyed by any subject prior to that date was revoked and annulled by said Act, and that all claims must now date from the Act of 1839, or from some subsequent date.

There are only two grounds remaining on which the plaintiffs might sustain their claim, to wit: (1) that it is based on grant, or (2) was an appurtenance to the land.

It is argued that these statutes are in the nature of grants and are sufficient to vest title to the fisheries in the landlords, and that the word "give," used in the Act of 1839, is a word of conveyance and was sufficient to pass title to the fisheries from the king to the konohiki, and that the title so conveyed become a vested right within the meaning and intent of section 95 of the Organic Act.

We do not agree with this contention. Aside from the absence of definite description of the alleged subject of the grant, and the absence of a definite grantee, the statutes themselves bear conclusive evidence that they were not intended as grants of property and that they were not intended to be more than appears from their plain terms, to wit: grants of special privileges to persons who then were or might thereafter become landlords.

The statute of 1851 granting to the people certain rights of piscary, shows a clear intent to make a grant both in the title and body of the law. Words of grant are used. "All fishing grounds," etc., "shall be and are hereby forever granted." If

it had been the intention to convey an absolute right of property to the landlords by the other statutes, it seems that suitable words of grant would have been employed. That such words were not used can only be explained on the theory that a grant was not intended, and we so construe the statutes.

It is contended that the fishery was an appurtenance to the land, and passed by deed or patent without special reference thereto in the conveyance.

The statute declares the fisheries within the reefs and for one mile from shore where there is no reef, to be the "private property" of the konohiki or landlord. We understand the word *property* to be used in this statute in a general sense, meaning dominion over a thing. (1 Blackstone, 122; 2 id. 1.) "The word 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal significance, means only the *rights* of the owner in relation to it. It denotes a right over a determinate thing." Andrew's American Law, section 96.

The phrase "private property," used in the law, cannot mean more than the rights which the statute gave to the konohiki or landlord over the fishery, and such private property could not be said to be held by contract or any covenant in the nature of a contract.

A parallel is sought to be drawn between the fishery statutes and the United States statutes permiting settlers to take up homes on the public domain. The analogy is not apparent. There is a wide distinction between the statutes and the rights that may be acquired under them. The United States homestead statute is not self-executing, nor is it

a grant of land to the homesteader. It provides a method by which a qualified person who complies with the terms prescribed, may acquire title to land. The title passes from the government to the homesteader when the patent issues, and not before (Shiver vs. The United States, 159 U. S., 491). Again, the one statute relates to land that may be possessed, occupied, cultivated, and improved with buildings and structures, while the other relates to water, not water passing with the soil under it or confined within bounds, but water in the open sea, changing with the rising and ebbing of the tide; it gave no right to the land under the water and no right to place any structure or improvement thereon, not even to anchor a house-boat, but a privilege to take fish from this area of water, if caught while there—a mere theoretical species of property at best.

If the "private property" possessed by the konohiki in the fishery was only the right given by the statute, then it follows that when the statute was repealed, there was no further claim of "private property" in the fishery, because that which gave the right, or "private property," was no longer in existence. In this view, and we take it to be the correct view, the plaintiffs could acquire no vested right in the fishery. While the statutes were in force, plaintiff's private property in the fishery was protected, but when they were repealed there was no property in the *res*. These statutes were general laws. "Citizens have no vested rights in the existing general laws of the State, which can preclude their amendment or repeal, and there is no implied promise on the part of the State to protect its citizens against incidental injury occa-

sioned by change in the law" (Cooley, Const. Lim., p. 343).

Again the same author says:

"In organized society every man holds all he possesses and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense." Cooley, p. 437. . . .

"All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they became divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order." Id., p. 438.

This view is in perfect harmony with the contemporaneous construction placed on these statutes in the leading case on the subject in this Court (Haalelea vs. Montgomery, 2 Haw., 62). In that case Mr. Justice Robertson said that the landlord "could have transferred the fishery, or her right therein, only by an express grant *co nomine*. Had she made a deed of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either

the fishery or her rights therein would have passed to the grantee" (p. 70).

* * * * * * *

And again, "If any person who has acquired a kuleana on the Ahupuaa of Honouliuli should sell and convey his land, or even a part of it to another, a common right of piscary would pass to the grantee as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance, it would pass as an incident. Here, we think, is the great distinction between the rights of the konohiki and those of the tenants or occupants, for while the former holds the fishery as his private property, the latter has only a right of piscary therein as an incident of his tenancy." Id., p. 71. Here it is declared that the konohiki's or landlord's rights in the fishery are private property, and as such could not pass as an appurtenance to the land; that in order to convey it specific words of grant must be used in the conveyance for that purpose. This decision was rendered in 1858, one year before the adoption of the Civil Code, and its correctness, so far as we are advised, is now questioned for the first time. It is contended that this part of the decision is mere *dicta*, and was not involved in a decision of the issues in that case. Even if this be true it does not appear how that fact would weaken the declaration as a correct interpretation of the theory of the law on which the fishery rights in these islands are based. The decision was by Mr. Justice Robertson, whom the late Chief Justice Judd declared "our best authority" on early Hawaiian tradition, history and jurisprudence. It appears to have been accepted by the bench and bar of the islands as a

correct declaration of law of the question for most half a century, and no sufficient reason has been advanced to warrant us in questioning its correctness at this time.

This construction of the statute is further supported by the fact that the Land Commission, although given authority to award "rights of piscary" by the statute creating it (Statute Laws, vols. I and II, Sec. 7, p. 109), refused to award fisheries either as "rights or territory," except in a very few instances, leaving the parties to their rights under the general statutes. *Akeni vs. Wong Ka Mau*, 5 Haw., 91.

It is also confirmed by the language found in the first section of the act of May 24, 1851, passed to protect the people in certain fishing grounds forbidding anyone who had acquired Government land from exercising exclusive rights "over any fishing ground *not included in his title*, although adjacent to said lands." This inhibition was carried forward into the Civil Code of 1859, as Sec. 393, and into the Penal Laws of 1897 as Sec. 1458.

We do not understand that any of the adjudicated cases in this jurisdiction are opposed to this theory.

It was held that the konohiki or landlord had no power to alienate a single right given by law to the tenant in a sea fishery. *Oni vs. Meek*, 2 Haw., 87.

Also that although the Land Commission heard evidence relative to the boundaries of the fisheries claimed by the konohiki and refused to award the fishery either as a right or territory, and although the konohiki of the adjoining land was present at the hearing still he was not estopped from disputing the boundary of the sea fishery claimed to be

shown by such evidence. *Akeni vs. Wong Ka Mau,* 5 Haw., 91.

While in *Shipman vs. Nawahi,* 5 Haw., 571, the fishery is spoken of as "adjoining and appurtenant to plaintiff's land called Waiakea," the action was for damages for trespass upon the fishery. Judgment was for the plaintiff in the Court below, but on appeal it appeared that the defendant had a kuleana in the land of Waiakea hence a right to fish and a new trial was ordered.

The case of *Judd vs. Kuanalewa,* 6 Haw., 329, was an action of ejectment by one landlord against another for possession of a fishery. It was found that there had been a division of the fishery by the parties, and judgment was rendered accordingly.

Hatton vs. Piopio, 6 Haw., 334, was an action against a tenant for unlawfully catching and selling fish, it was held that "under our fishing laws every resident on a land has the right to fish in the sea appurtenant to the land, and to sell the fish caught by him."

Shipman vs. Commissioners of Crown Lands, 6 Haw., 351, was a suit in equity by the plaintiff's lessees of a sea fishery seeking an injunction to restrain the defendant from trespassing and fishing. It was held that no irreparable damage was shown, and that there was an adequate remedy at law both by an action of damage and also under the statute by criminal proceedings. Injunction refused.

These we understand to be the principal decisions of this Court construing the fishery statutes. While in some of them the fishery is spoken of as being "appurtenant to the land" and as "an appurtenant of the land," still in no one of them does the Court in the slightest degree detract from the force of the law announced in *Haalelea vs. Montgomery,* or attempt to overrule the law there de-

cared that a sea fishery could not pass as an appurtenance to the land. As a matter of fact, the fishing rights were appurtenant to the land so long as the statutes were in force, but when the statutes were repealed these appurtenances were such no longer.

"Fish in the open sea are animals *ferae naturae,* and go and come at will unrestrained." (Hatton vs. Piopio, 6 Haw., 337.) But when taken fish were private property and entitled to the protection of the law. It was entirely proper for the legislature to prescribe penalties for violation of the fishing statute, and for the courts to entertain civil actions for damages for trespassing against the rights given by statute.

In the second case, the claim of grant is based upon a clause in the patent for the land of Moanalua. It appears in the patent after the operating words of grant and the description of the land conveyed that there is a recital relative to the fishery as follows, to-wit: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows." Then a description of the fishery claimed in the petition is set out by metes and bounds. The habendum clause of the patent reads in part, "To have and to hold the above granted land, in fee simple, unto the said Lot Kamehameha," etc. The patent was a grant of land. The operating words of grant are not enlarged by the habendum clause. The fishing right was not land or a necessary part thereof. The word "attached" cannot be construed as a word of grant or as showing an intention to convey. It does not appear from the patent that it was the intention of the grantor to convey the fishery. The recital relative to the fishery may have been inserted for the purpose of making plain the boundaries of the fishery

adjoining the land, and in which the statute gave the landlord special privileges. The plaintiffs, it seems, took this view of the matter, as the evidence shows that he exercised the right in the fishery under the statute.

Under the common law the right of fishing in the open sea like that of navigation was a public right. The grant of an exclusive right to a sea fishery cannot be presumed. Every presumption is against the grant and in favor of the public. Every ambiguity or doubt in the instrument by which the right is claimed to be granted will be construed most strongly against the grantee.

Rapid Transit Co. vs. Tram Co., 13 Haw., 363, 371; Charles River Bridge vs. Warren Bridge, 11 Pet., 420; Fertilizer Co. vs. Hyde Park, 97 U. S., 659; Newton vs. Commissioners, 100 U. S., 548; Shively vs. Bowlby, 152 U. S., 1.

Applying this well established rule of construction to the facts, we are bound to hold that the patent to the land of Moanalua did not grant the sea fishery adjoining.

Exceptions are overruled.

Hatch & Silliman for the plaintiff.

Cecil Brown and Magoon & Peters on brief.

Robertson & Wilder for defendant.